IN THE

Supreme Court of the United States

October Term, 1939.

No. 638.

APEX HOSIERY COMPANY, a Pennsylvania Corporation,
Petitioner.

v.

WILLIAM LEADER and AMERICAN FEDERATION OF FULL FASHIONED HOSIERY WORKERS, PHILADELPHIA, BRANCH NO. 1, LOCAL NO. 706,
Respondents,

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit and Brief in Support Thereof.

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APEX HOSIERY COMPANY, A PENNSYLVANIA CORPORATION,

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v.

WILLIAM LEADER AND AMERICAN FEDERATION OF FULL FASHIONED HOSIERY WORKERS, PHILADELPHIA BRANCH NO. 1, LOCAL NO. 706,

Respondents.

PETITION FOR A WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Apex Hosiery Company respectfully sets forth the following:

SUMMARY STATEMENT OF MATTERS INVOLVED.

The controlling issue involved in the present case is whether the actions of the respondents constitute a restraint of commerce in violation of the Act of 1890, c. 647, 26 Stat. 209, 15 U. S. C. A. Sec. 1 (popularly known as the Sherman Act).

This suit was instituted by the Apex Hosiery Company (hereinafter referred to as Apex) against the American Federation of Hosiery Workers, Branch No. 1, Philadelphia, a labor union, (hereinafter referred to as Union), and

its officers, to recover the damages Apex sustained to its plant, machinery and business as a result of the Union's violation of the Sherman Act under the following set of facts:

Apex is the second largest hosiery concern in the country (R. 101), its factory being located in Philadelphia, Pennsylvania, where it employs over 2500 persons (R. 252), and does an annual business of $5,000,000. Its principal raw materials are silk, which it receives from Japan (R. 148) and cotton, which it receives from the South (R. 148). More than 80 per cent. of its sales and shipments of finished merchandise are interstate (R. 109).

Apex operated a non-union shop (R. 110), but at all times collectively bargained with its employees on questions of hours, wages and conditions of work (R. 110). Prior to May 6, 1937, there had been no controversy between employees and management (R. 123). No complaint was ever filed with either the State or National Labor Relations Board, by either the Union or any employee of Apex (R. 122).

In April of 1937, *when the Union had only eight members among the 2500 employees of Apex* (R. 735), it sent a letter to Apex demanding a closed shop union agreement (R. 121), the execution of which would have been illegal under Sections 8 (3) and 9 (a) of the National Labor Relations Act, since the Union was not the chosen representative of a majority of the Apex employees. From then until May 6, 1937, no discussion with Apex of the terms of such an agreement was sought by the Union (R. 121).

On May 6, 1937, when the Union's membership in the Apex plant was still only eight out of 2500 (R. 735), the Union organized a demonstration, ordering out for that purpose union members of other hosiery mills (R. 82, 90,

94), with the result that early in the afternoon a mob of more than 15,000 persons gathered outside the Apex plant (R. 260). At about 2:30 P. M., William Leader, president of the Union, stood at the head of the mob at the closed front door of the Apex mill, and demanded to see its president (R. 183). Leader was informed that the president of Apex would not confer with him while a mob of people was outside the mill, but that he would confer with him at his attorney's office (R. 127). Thereupon, amid pounding on the front door of the mill (R. 128), Leader was heard to exclaim: "I announce a strike at the Apex Hosiery Company and you can rest assured before the day is out, there will be a sit-down strike, and it will not reopen until it opens as a closed shop" (R. 184).

Immediately following this announcement, a barrage of missiles, iron bars and clubs shattered the plant windows, and through them a company of raiders was bodily thrown into the plant (R. 128); the front door was crashed in and a mob of thousands stormed into the mill (R. 261). Office partitions, records, desks, typewriters, adding machines and filing cabinets were destroyed (R. 128, 193). The president of Apex was hit by a stone and struck in the back of the neck by an ink well (R. 128). The general manager of Apex was beaten by members of the mob (R. 262). An elevator operator was beaten on the head with an iron pipe, knocked down, and kicked in the face, resulting among other injuries, in a fractured jaw, necessitating three weeks hospitalization (R. 198, 199). Another employee was so beaten that he sustained five broken ribs and required two and one-half weeks of hospitalization (R. 203).

While the plant was thus being laid waste by the mob, respondent Leader, accompanied by the Union's attorney and a committee of its members, came into the office of the

president of the company and demanded, "Now, are you ready to sign this agreement?" (R. 129.) The president replied that he would not sign under such conditions (R. 129). Thereupon, Leader went into the wareroom and organized the sit-downers who were to hold possession of the plant. Standing upon a table, Leader addressed several hundred persons gathered about him (R. 222) instructing them that they were to be the sit-downers (R. 222); that the Union would not let them leave the plant until Apex signed a closed shop agreement (R. 223); that the Union would take care of them and supply them with cots, blankets and food (R. 223); that they were to organize and appoint a chairman, and that it was just the same as if they were in the army (R. 223). Meanwhile, members of the group passed out "pledge cards" which they forced everyone to sign (R. 227), by which the signer pledged himself to go on a sit-down strike at Apex until the company signed a closed shop agreement (R. 229). Later in the day, while Leader was still on the premises, food, cots and blankets were brought into the mill by the Union for the sit-downers (R. 227,228).

Thereupon, the sit-downers organized themselves, elected a chairman, and set up various committees (R. 769). The next day all locks on all gates and entrances to the mill were changed and only the sit-downers were given keys, no one being allowed to enter or leave the mill without their permission (R. 313, 410, 787).

The sit-downers forcibly maintained exclusive possession of the mill from May 6, 1937 until June 23, 1937, when they were evicted by order of the Circuit Court of Appeals for the Third Circuit in an injunction proceeding based on the respondent Union's violation of the Sherman Act (*Apex Hosiery Co. v. Leader*, 90 F. (2d) 155 (1937)). Dur-

ing the period of their occupancy of the Apex mill, the sit-downers damaged and wrecked a total of 134 legging and footing machines, thirty machines being wrecked on June 10th (R. 421), and 104 machines on June 22d (R. 440, 445-457), which was the day after the Circuit Court of Appeals by injunctive decree, had ordered the sit-downers out of the plant. In addition, there was extensive damage to other property and equipment.

Pursuant to the conspiracy, the Union, during the entire period the sit-downers were in possession of the Apex plant, paid them strike benefits (R. 332, 339-354); supplied them with food from the Union's central strike kitchen (R. 359); and furnished them medical care (R. 360).

On May 6, 1937, when its plant was seized by respondents, Apex had on hand approximately 134,000 dozens of finished hosiery, valued at approximately $800,000. (R. 150, 151) ready for shipment against unfilled orders, 80 per cent. of which were to be shipped to customers outside of Pennsylvania (R. 522). During the sit-down, Apex on three different occasions specifically requested the Union's permission to remove this finished merchandise for shipment against orders on hand (R. 618-621), but the Union's reply was that not one dozen pairs of hose could be shipped until a closed shop agreement was signed (R. 620).

As a result of the damage to the company's plant, machinery and equipment, the plant was unable to resume even partial operations until August 19, 1937 (R. 271), and it was not until November 1, 1937, that its normal operations could be resumed (R. 271).

The case was tried before Judge Kirkpatrick and a jury, and on April 3, 1939, the jury returned a general verdict for the plaintiff (petitioner herein) in the sum of

$237,310.85, the itemization of which was set forth by the jury in answers to written interrogatories given them by the trial judge (R. 1363-1367). The trial judge thereupon trebled the verdict to $711,932.55 in accordance with the provisions of the Sherman Act as amended by Section 4 of the Clayton Act (Act of 1914, c. 323, 38 Stat. 731, 15 U. S. C. A. Sec. 15).

Thereupon the defendants (respondents herein) filed an appeal with the Circuit Court of Appeals for the Third Circuit, which Court, on November 29, 1939, reversed the judgment on the ground that the above facts did not establish a violation of the Sherman Act. In so holding, the Circuit Court overruled its own decision rendered June 21, 1937, in the injunction proceedings instituted by Apex to oust the sit-downers, in which it had held that these same facts did establish respondents' violation of the Sherman Act.

A Petition for Rehearing filed with the Circuit Court of Appeals, was denied on December 27, 1939.

JURISDICTION.

1. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. A. Sec. 347 (a)).

2. The date of the judgment of the Circuit Court of Appeals for the Third Circuit herein sought to be reviewed is November 29, 1939. A Petition for Rehearing filed with said Circuit Court of Appeals was denied on December 27, 1939.

QUESTIONS PRESENTED.

1. Did not the Circuit Court of Appeals err in setting aside the jury's finding of fact that respondents intended to restrain interstate commerce, when this finding was amply supported by direct evidence, including the respondents' deliberate refusal, when requested, to permit petitioner's interstate shipments of finished merchandise?

2. Did not respondents' stoppage of petitioner's manufacturing and shipping operations have a direct and immediate effect on interstate commerce?

3. Did not the Circuit Court of Appeals err when it held that the Sherman Act was not violated because an unreasonably great volume of commerce was not restrained?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The decision of the Circuit Court of Appeals for the Third Circuit that the effect on interstate commerce of respondents' stoppage of petitioner's operations was indirect and remote is in plain conflict with decisions of this Court holding that stoppage, by industrial strife, of the manufacturing and shipping operations of a plant "in the flow of commerce" has a direct and immediate effect and burden upon interstate commerce.

2. The decision by the Circuit Court of Appeals for the Third Circuit that there cannot be a restraint of trade in violation of the Sherman Act unless an unreasonably great volume of commerce is restrained, is in direct conflict with the decisions of this Court and of other Circuit Courts of Appeals.

3. The Circuit Court of Appeals for the Third Circuit has now reversed its own decision, rendered only two years previously, in an action between the same parties, in which it held, upon the same facts and issues as in the case at bar, respondents had violated the Sherman Act.

4. The Circuit Court of Appeals for the Third Circuit has decided a question of national importance to both labor and industry, in conflict with applicable decisions of this Court.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and send to this Court on the date to be designated in said Writ, a full and complete transcript of the record of all proceedings in this case numbered and titled on its docket, "No. 7085, March Term, 1939, William Leader et al. v. Apex Hosiery Company", to the end that said case may be reviewed and determined by this Court as provided by law, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem proper.

APEX HOSIERY COMPANY,

By SYLVAN H. HIRSCH,
Attorney for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. . October Term, 1939.

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Petitioner,

v.

WILLIAM LEADER AND AMERICAN FEDERATION OF FULL FASHIONED HOSIERY WORKERS, PHILADELPHIA BRANCH NO. 1, LOCAL NO. 706,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania was filed April 24, 1939, and has not been officially reported. It appears in the record at page 1389.

The opinion of the Circuit Court of Appeals for the Third Circuit was filed November 29, 1939, and has not been officially reported. It appears at the end of the record. A petition for rehearing, filed with the Circuit Court of Appeals on December 20, 1939, was denied without opinion, on December 27, 1939.

ARGUMENT.

I. The Circuit Court Erred in Setting Aside the Jury's Finding of Fact That Respondents Intended to Restrain Interstate Commerce, Since This Finding Was Amply Supported by the Evidence.

In reversing the judgment entered on the jury's verdict, the Circuit Court of Appeals stated (Opinion, page 17):

> "The verdict was necessarily based on the existence of an intent by the appellants to form a combination in restraint of trade and commerce. The record does not furnish support for the finding of such intent."

In reaching this conclusion, the Circuit Court completely disregarded fundamental principles of law governing the respective functions of the court and jury. When the Circuit Court concluded as a fact, that the respondents did not intend to restrain commerce, it erroneously invaded the exclusive province of the jury, which found as a fact that respondents did intend to restrain interstate commerce—a finding which was fully supported by the following evidence:

(a) A "pledge card" distributed by respondent union prior to the "sit-down" strike in which the signer pledged to join the union and "to go on a sit-down strike" at the Apex mill "to bring about full recognition of our demands and the union" (R. 229).

(b) The respondent union's deliberate and violent seizure of petitioner's plant; exclusion of petitioner's officers and employees (R. 313, 410, 787) and its stoppage of

petitioner's manufacturing and shipping operations for a period of approximately seven weeks, until finally evicted by an order of the Circuit Court.

(c) The declarations of William Leader, president of respondent union, on the day petitioner's plant was invaded and seized, that the Union would hold possession of the plant until its closed shop demands were granted (R. 223).

(d) The respondent union's supplying its sit-down strikers with cots and blankets (R. 227, 228), food (R. 359) and strike pay (R. 332) pursuant to its plan to remain in complete and exclusive possession of petitioner's plant until their demands were granted.

(e) The respondent union's repeated refusals (R. 618-621) to grant petitioner's requests for permission to remove and ship $800,000. of finished merchandise from its factory, 80 per cent. of which was for orders on hand from customers located outside of Pennsylvania, such requests being met by the president of respondent union with the statement (R. 620):

> "War is war, and we won't let you remove one dozen pair of hosiery against any order until you give us a closed shop agreement."

This evidence, showing a preconceived plan by respondent union and its officers to seize and hold petitioner's plant and prevent its manufacturing and interstate shipments of finished merchandise until their demands were granted, was clear and unequivocal proof of respondent's intent to restrain interstate commerce. To assert, as did the Circuit Court, that this evidence did not furnish support for the jury's finding of respondent's intent to restrain

interstate commerce, and to reverse the jury's finding of this fact because it was contrary to that which the Court might have found if it had been the fact finding body, was clearly error and an usurpation of the jury's function as the sole fact finding body. Indeed, this holding by the Circuit Court was in complete disregard of the express recognition by this Court that the evidence produced by petitioner is the very evidence which does prove an intended restraint of interstate commerce. This Court, in *United Leather Workers v. Herkert*, 265 U. S. 457, 68 L. ed. 1104 (1924) held that the defendant union had not violated the Sherman Act only because of the absence of the very evidence which was found to exist in the case at bar. Said this Court (page 463):

> "There was no evidence whatever to show that complainants were obstructed by the strike or the strikers in shipping to other states the products they had ready to ship, or in their receipt of materials from other states, needed to make their goods. While the bill averred that defendants had instituted a boycott against complainants, and were prosecuting the same by illegal methods, there was no evidence whatever that any attempt was made . . . to interfere with their interstate shipments of goods ready to ship."

It is respectfully submitted that where the Circuit Court fell into error on this question was in its misconstruction of the word "intent" as being the equivalent of the word "purpose" or "object". Said the Court (Opinion, page 17):

> "The evidence in the case at bar supports but one conclusion, namely . . . that the intent and purpose of the appellants at the time of the formation

of their conspiracy and thereafter was to unionize the Apex plant, not to restrain commerce or to affect prices within the industry."

But the intent, in the sense of "purpose" or "object", of the labor union involved in every Sherman Act case decided by this Court has been merely to unionize the particular plant involved, rather than to restrain commerce. Nevertheless this Court has squarely held that such an ultimate object does not preclude a finding of intent to restrain commerce in violation of the Sherman Act. In *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn.*, 274 U. S. 37, 71 L. ed. 916 (1927) this Court, at page 47 said:

> "Respondents' chief contention is that 'their sole and only purpose . . . was to unionize the cutters and carvers of stone at the quarries'. And it may be conceded that this was the ultimate end in view.
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> . . . . . .
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> "A restraint of interstate commerce cannot be justified by the fact that the ultimate object of the participants was to secure an ulterior benefit which they might have been at liberty to pursue by means not involving such restraint."

Therefore, it is respectfully submitted that since the evidence produced in this case fully supported the jury's finding that respondents intended to restrain interstate commerce, the Circuit Court erred in reversing the judgment on the ground that there was no such proof. Moreover, where the evidence establishes, as in the case at bar, that respondents restrained interstate commerce by their seizure and retention of petitioner's plant and prevention of its manufacturing and interstate shipments, intent to

restrain will be presumed as a matter of law, since it is well settled that conspirators are presumed to have intended the necessary, natural and probable consequences of their unlawful acts. *United States v. Patten*, 226 U. S. 525, 57 L. ed. 333 (1913); *Industrial Association of San Francisco v. United States*, 268 U. S. 64, 69 L. ed. 849 (1925); *Bluefields S. S. Co. v. United Fruit Co.*, 243 Fed. 1 (C. C. A. 3rd, 1917).

II. The Circuit Court's Holding That the Effect on Interstate Commerce of Respondents' Stoppage of Petitioner's Operations Was Indirect and Remote Is in Plain Conflict With Decisions of This Court.

The second reason relied upon by the Circuit Court for holding that petitioner failed to prove a restraint of trade in violation of the Sherman Act, was that the stoppage of petitioner's receipt of raw materials from points outside the state, its manufacturing operations and its shipment of finished merchandise to points outside the state, had but an indirect, incidental and remote effect upon interstate commerce.

This holding is in flat contradiction to the holding of this Court on the identical issue in the recent cases challenging the constitutionality of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. A. Sec. 151 et seq.). In *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 81 L. ed. 893 (1937), this Court held that the stoppage, by industrial strife, of the operations of a manufacturing plant which, as in the case of petitioner, received its raw materials from points outside the state and shipped its finished merchandise to points outside the state, had a *direct and immediate*

rather than an indirect, incidental and remote, effect on interstate commerce. Said Mr. Chief Justice Hughes, speaking for this Court (page 41):

> "Giving full weight to respondent's contention with respect to a break in the complete continuity of the 'stream of commerce' by reason of respondent's manufacturing operations, *the fact remains that the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce. In view of respondent's far flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic.*" (Italics ours.)

The same reasoning and principles were expressly held by this Court to govern the companion case of *National Labor Relations Board v. Friedman-Harry Marks Clothing Co.*, 301 U. S. 58, 81 L. ed. 921 (1937), which involved a plant far smaller in size and output than petitioner's.

The Circuit Court, however, failed to follow the express ruling of this Court in the foregoing cases on the sole ground that the word "affect" as used in the National Labor Relations Act is broader in scope than the word "restraint" as used in the Sherman Act, saying (Opinion, page 18):

> "Congress used a very broad word, 'affect', in the National Labor Relations Act, thus evidencing its intention to embrace the entire field of interstate commerce confided to it by the Constitution. Upon the other hand in the Sherman Act, Congress employed the word 'restraint', which has a different and plainly more restricted connotation."

It should be noted that the words "affecting commerce" are defined in the National Labor Relations Act

(Sec. 2 (7)) to include "burdening or obstructing commerce", which has always been considered by this Court as synonymous with "restraining commerce". But, in any event, the decisions of this Court in the *Jones and Laughlin* and companion cases did not turn on the meaning or scope of the word "affect" in the National Labor Relations Act. The issue in those cases was *whether the stoppage of operations in a particular manufacturing plant had a direct effect upon commerce*, for unless the effect was direct, Congress would not have had the power to prohibit local practices resulting in such a stoppage. When this Court decided that issue by holding that such a stoppage had a direct effect upon commerce, it announced a legal principle in no way confined to nor dependent upon the wording of the National Labor Relations Act, but one that was applicable to the present case or to any case where that issue is to be decided.

A full discussion of this question is also to be found in the opinion of this Court in *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453, 82 L. ed. 954 (1938).

Under the foregoing decisions of this Court, therefore, *respondents' unlawful stoppage of petitioner's operations had a direct effect upon commerce.* Once this direct effect upon commerce is shown, the necessary element of intent to restrain commerce is presumed as a matter of law, and the Sherman Act therefore is violated. In *National Labor Relations Board v. Jones & Laughlin, supra*, after an extensive review of Sherman Act labor cases, Mr. Chief Justice Hughes said (page 40):

> ". . . when the 'intent of those unlawfully preventing the manufacture or production is shown to be to re-

strain or control the supply entering and moving in interstate commerce. . . . their action is a direct violation of the Anti-Trust Act'. 268 U. S. p. 310. *And the existence of that intent may be a necessary inference from proof of the direct and substantial effect produced by the employees' conduct.* Industrial Asso. v. United States, 268 U. S. p. 81, 69 L. ed. 855, 45 S. Ct. 403." (Italics ours.)

It is therefore respectfully submitted that the Circuit Court erred in holding that the effect on interstate commerce of the complete stoppage of petitioner's operations, as a result of respondents' conspiracy, was indirect and remote, rather than direct and immediate, and that therefore the Sherman Act was not violated.

III. The Circuit Court Erred in Holding That a Restraint of Trade Must Be of an Unreasonable Amount of the National Volume of Commerce in the Commodity in Order to Constitute a Violation of the Sherman Act. This Test Is in Complete Conflict With Decisions of This Court and Other Circuit Courts of Appeals.

The conclusion of the Circuit Court that an unreasonable amount of trade must be restrained to render the activities of a labor union a violation of the Sherman Act is inconsistent with previous decisions of this Court, and the Circuit Court clearly erred when it said (Opinion, page 14):

"Furthermore, although the appellee did a business in the manufacture and sale of full fashioned hosiery of approximately $5,000,000. a year, this was a small part of the total industry. In 1936, the annual national shipments of full fashioned hosiery were 37,400,782 dozen pairs. In 1937, the annual national shipments amounted to 39,678,494 dozen pairs. The record

shows that during the last eight months of 1937, the appellee shipped 274,791 dozen pairs of stockings. Even if the appellee's output was quadrupled, it would amount to less than three percent of the total national output in the industry. The interruption of production incurred by the appellee through the acts of the appellants had small effect upon interstate commerce."

And again (Opinion page 18):

"In other words, in order to come within the purview of the Sherman Act, and thus to confer jurisdiction upon the Federal courts commerce must not only be affected, but also must be restrained and restrained into an unreasonable degree."

The quantity of shipments affected has never been held to be the test in labor combination cases (as distinguished from monopoly cases) arising under the Sherman Act, and the contention of respondents, adopted by the Circuit Court, that the volume affected must be unreasonably large, has been repudiated and rejected by this Court in labor combination cases. In the second Coronado Coal Case, 268 U. S. 295, 69 L. ed. 963 (1925), the defendant union in its brief (page 78) strongly urged that a restraint of the production in plaintiff's mines of 5000 tons of coal a day (compared to a national production of from 10,000,000 to 15,000,000 tons of coal per week) was too insignificant to constitute a restraint of commerce in violation of the Sherman Act. Nevertheless, this Court held that the Act had been violated, *although the plaintiff's production was but one-fifth to one-third of one per cent. of the national production of coal.*

Similarly, in *Lawlor v. Loewe*, 235 U. S. 522, 59 L. ed. 341 (1915) this Court permitted recovery of damages under

the Sherman Act, although the plaintiff employed only 230 persons and manufactured only $400,000. worth of hats annually—a very unsubstantial percentage of the total hat production of the country.

And again, in *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 65 L. ed. 349 (1921) this Court held the Sherman Act violated by the activities of a labor union even though the plaintiff's production was less than 8 per cent. of the total production of printing presses in the country.

Recognition of the principle that the volume of commerce restrained is not controlling has been nowhere more succinctly given than in the recent opinion of this Court in *National Labor Relations Board v. Fainblatt*, 306 U. S. 601, 83 L. ed. 1014 (1939) in which Mr. Justice Stone, speaking for the Court, stated (page 606):

> "The exercise of Congressional power under the Sherman Act, the Clayton Act, the Federal Trade Commission Act, or the National Motor Vehicle Theft Act, has never been thought to be constitutionally restricted *because in any particular case the volume of the commerce affected may be small.*" (Italics ours.)

In requiring that commerce be restrained to an "unreasonable degree", the Circuit Court purported to apply the so-called "rule of reason", but this rule has been applied by this Court only in the monopoly cases arising under the Sherman Act. In the labor cases, the only test has been whether the union's unlawful activities had a direct or an indirect effect upon commerce.

In addition to the foregoing decisions of this Court, Circuit Court decisions have uniformly rejected the contention that an unreasonable quantity of commerce must

be restrained by conspirators' unlawful acts in order that the Sherman Act be violated. In *Steers v. United States*, 192 Fed. 1 (1911), in which defendants had restrained the shipment of only four hogsheads of tobacco, this contention was squarely rejected by the Circuit Court of Appeals for the Sixth Circuit, which stated in its opinion, at page 4:

> "The first ground of demurrer was that one shipment by one shipper to another state does not amount to that interstate trade, the restraint of which is forbidden. This argument is based upon . . . the supposed holding in the recent Standard Oil and Tobacco Cases, 221 U. S. 1, 106, 31 Sup. Ct. 502, 632, 55 L. ed. 619, 663, to the effect that, in order to be covered by this statute, the restraint of trade must be of considerable quantity; that is, of unreasonable amount."
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> . . . . . .
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> "We do not find in the Standard Oil and Tobacco Cases any holding that a direct restraint of trade must affect an unreasonably great amount of commerce in order to be within the prohibition. As we read these opinions, the matter under consideration, from the standpoint of reason, was not the amount of merchandise or traffic affected by the restriction, but the character and extent of the restriction itself; and it was thought that, if such restriction reasonably pertained to lawful results, it was not of itself necessarily forbidden. *These opinions contain no justification for the idea that a direct and absolute restraint, bearing no reasonable relation to lawful means of accomplishing lawful ends, can be permitted only because the volume of traffic affected is not very great.* (Italics ours.)

And in answer to the same argument advanced against the invoking of the Sherman Act, where the defendants' combination restrained *but a single shipment of a steel*

billet, the Circuit Court, in *O'Brien v. United States*, 290 Fed. 185 (1923), held that:

> ". . . the existence of the offense is found not in the amount of commerce restrained, but in the direct and absolute character of the restraint."

To the same effect is *Patterson v. United States*, 222 Fed. 599 (1915).

Accordingly, it is respectfully submitted that the ruling of the Circuit Court is contrary to the decisions of this Court and of other Circuit Courts of Appeals, since it is based upon the erroneous principle that an unreasonable volume of commerce must be restrained before the Sherman Act can be said to have been violated.

Conclusion.

In conclusion, it is respectfully submitted that this case is one particularly appropriate for review by this Court, since:

(A) The jury's finding of respondents' conspiracy in restraint of commerce was amply supported by evidence:

(1) That respondents deliberately planned and carried out the violent seizure of petitioner's plant, and its unlawful retention.

(2) That respondents intended to and did prevent petitioner's receipt of raw materials, its manufacturing, and its shipment of finished merchandise interstate until their demand for a closed shop had been met (compliance with which would have been illegal under the Wagner Act because respondent union had but eight members among petitioner's 2500 employees).

(3) That respondents, during the period of their exclusive possession of petitioner's plant, deliberately

refused petitioner's repeated requests for permission to remove and ship interstate more than $800,000. of finished merchandise against orders then on hand.

(B) The Circuit Court of Appeals has now reversed its own decision rendered only two years previously in an action between the same parties and involving the same facts and issues and in which it held the Sherman Act to have been violated.

(C) The present decision is in plain conflict with the uniform decisions of this Court and of other Circuit Courts of Appeals.

(D) The question whether the respondents' stoppage of petitioner's operations constitutes a violation of the Sherman Act is one of national importance to both labor and industry.

Respectfully submitted,

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